IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date of Decision: 1-8-1996.

CRIMINAL APPEAL No. 168 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

---

State of Gujarat : Appellant.

Versus

1. Arsi Mulu Aiyar,
2. Natha Mulu Aiyar,
3. Khima Mulu Aiyar : Respondents.

---

Appearance:
Shri S.T. Mehta, APP, for the appellant State.
Shri K.G. Sheth, Advocate for the respondents.

---

CORAM : MR.JUSTICE H.R.SHELAT
Date of decision: 01/08/96

ORAL JUDGEMENT

The respondents were tried on the charge of the offences punishable under Section 447, 452, 506 (2) read with Section 114 of the Indian Penal Code, before the then learned Judicial Magistrate (F.C.) at Junagadh in Criminal Case No. 4066 of 1984 on his file and he at the

end of the trial on 7th January 1989, came to be acquitted. The State has, therefore, preferred this appeal challenging the order of acquittal.

2. Vikrambhai Vakmatbhai Badarkha is the practising advocate at Junagadh. His sister married the respondent No.3. The respondent No.3 has a daughter named Mani. Some times after the marriage, the respondent No.3 and sister of Vikrambhai Badarkha were not pulling on well for one or the another reason. Vikrambhai Badarkha had therefore filed an application for maintenance under Section 125 of Criminal Procedure Code after his sister was driven out and neglected. He succeeded in getting the order of maintenance. Because of this proceeding, the respondent No.3 and other respondents who are the brothers of respondent No.3 were annoyed. They were hovering for an opportunity to trap Vikrambhai Badarkha and harass him or do away with. After the order was passed, the same was not complied with, and therefore necessary execution proceedings were also initiated. Thereafter the matter was settled and the sister of Vikrambhai Badarkha was divorced. After she was divorced she started to reside with Vikrambhai Badarkha, while Maniben the daughter of his sister remained in the custody of the respondent No.3. After the passage of time, Maniben, the niece of Vikrambhai Badarkha sent message and informed that she was not happy; she was being ill-treated by her father the respondent No.3. Vikrambhai Badarkha then filed the application before the Court of the Judicial Magistrate (F.C) at Junagadh for such warrant and obtained the custody of Maniben. Hence the vengeance and ill-will the respondents had bred were accelerated. They then decided to do away with Vikrambhai Badarkha. On 13th August 1984 in the evening, Vikrambhai Badarkha and his son Prakash were at home, while his wife, his niece and his daughter had gone to the temple for darshan. At that time, the respondent No.1 armed with a knife and other respondents armed with sticks, went to the house of Vikrambhai Badarkha. They trespassing into his house threatened him with dire consequences uttering that it was then a good chance he was trapped and the opportunity they got should not be allowed to be lost. The respondents Nos. 2 & 3 were instigating the respondent to give the knife blow, as a result the respondent No.1 rushed towards Vikrambhai Badarkha but could not succeed because Bhatukhbhai, the tenant of Vikrambhai timely reached there hearing the uproar and caught hold of respondent No.1 from behind. Vikrambhai Badarkha jumping over the compound wall went to the police station. The respondents Nos. 2 and 3 fled but as Bhatukhbhai was successful in holding the

respondent No.1 he could not run away from the place. Meanwhile, Vikrambhai came back with some of the police constables. The respondent No.1 was then apprehended and the complaint came to be lodged. After the usual investigation the chargesheet against the respondents came to be filed before the lower Court. Hearing the parties, a plea was taken framing a charge to which respondents pleaded not guilty and in defence submitted that because of the ill will the complainant had bred, owing to matrimonial problems of his sister and consequential proceeding before the Court, they were wrongly involved engineering the case. The prosecution led necessary evidence. Appreciating the evidence, the learned Magistrate found that the prosecution had failed to establish the charge beyond reasonable doubt. He therefore acquitted all the respondents. It is against that judgment and order, the present appeal is preferred before this Court.

3. Assailing the judgment and order of the lower Court, the learned APP, Mr. Mehta submitted that appreciation of the evidence made and conclusions drawn by the lower court were arbitrary and perverse and wholly in disregard of the sound principles of law. According to him, the evidence of the complainant and his son was consistent, trustworthy and convincing, but the learned Magistrate has unnecessarily found fault with the same and assigning unpalatable reasons acquitted the respondents. He also submitted that this Court was free to take its own view without being obsessed with the principle that this Court cannot ordinarily interfere in the order of acquittal or disturb the order of acquittal.

4. No doubt, ordinarily the principle of law is that the appellate Court should not disturb the order of acquittal in case when two views are reasonably possible, but where the approach of the Trial Judge is manifestly erroneous and the conclusions drawn are wholly unreasonable and perverse, the principle is not applicable. For such view, a reference of a decision in Bharwad Jakshibhai Nagjibhai and others vs. The State of Gujarat - 1996 (1) G.L.H. 226, may be made. I have, therefore, to examine whether there is a reason to deviate from the ordinary principles of law, and for that purpose it is to be ascertained whether the approach of the learned Judge is manifestly erroneous or his reasonings are perverse.

5. I have gone through the evidence on record and I do not see any reason to upset the findings of the learned Judge below because I find that the appreciation

of evidence made and conclusions drawn are quite in consonance with the principles of law. No doubt, Vikrambhai Badarkha (Exh.15) and his son Prakash Vikram (Exh. 20) have given the evidence parallel to the FIR lodged or the statement recorded by the police, but that cannot be a ground to accept the evidence and conclude in favour of the prosecution. If that is done, it would amount to blindly accepting the case of the prosecution. The duty of the Court is to dissect the evidence with meticulous care and finicky details and reach a conclusion about reliability of the evidence. When accordingly, the evidence is weighed, certain infirmities come to light. According to Vikrambhai and Prakashbhai, when police went to their place their tenant, Bhatukhbhai had caught hold of respondent No.1 and was detained there. He was caught with the knife in his hand, but what is shocking and pertinent to note is that the police has not seized the knife though according to the prosecution it was in the hands of respondent No.1. At one stage, it is stated that accused No.1 was taken to the police station with the knife in his hand. The police then apprehended him, but the knife which was with him is not seized. Why that knife is not seized has not been explained by the prosecution. If for the reasons best known to the prosecution, the police does not seize the knife, a weapon of offence, certainly the evidence cannot be accepted without any independent corroboration because non-seizure of the knife, though it was possible, is a strongest circumstance on record going to discredit the truth of the case of the prosecution.

6. Bhatukhbhai Naranbhai was tendered by the prosecution before the Court. His evidence (Exh. 21) in no way supports the case of the prosecution. According to him, he was at home in the evening. He had seen that Vikrambhai and two other persons were sitting in the verandah. They might be respondents Nos. 2 and 3, but he did not see any thing else or heard nothing and according to him no incident as alleged took place. No doubt, he is declared hostile, and therefore prosecution may say that independent evidence was tendered but as the witness turned hostile, the duty of the court would be to appreciate other evidence that is found on record which is trustworthy. The other evidence, for the reasons stated above, is not appealing and requires to be viewed with suspicion. It is not the case that the prosecution was helpless in bringing other evidence on record. According to Vikrambhai, Bhagatsinh had seen the incident being happened. Though he is available is not examined. When the party withholds the evidence available, it is also a strongest circumstance on record discrediting the

truth of its case. When in this case without any good reason the evidence of Bhagatsinh is withheld, the case of the prosecution must be viewed with suspicion.

7. On one more ground also, the learned Judge below was perfectly right in not placing reliance on the evidence on record. Rameshbhai Vikrambhai did not make statement before the police that all the three respondents had come into his Verandah and Bhatukhbhai caught hold of respondent No.1 and snatched the knife from him. Likewise, Vikrambhai Badarkha has also not stated before the police. When on this material aspect, necessary statement is not made before the police at the right earnest, there is a reason to believe that at the time of hearing, suitable improvements of course turned out to be fatal were made, and as per those suitable improvements, giving a shape foreign to the original story the evidence was led, which is also a circumstance raising reasonable doubt, the benefit of which must go to the respondent. On no other ground, submissions were made. For the aforesaid reasons, the contention advanced on behalf of the appellant cannot be accepted. The evidence on record is not appealing, or free from doubt. The learned Judge below was, therefore, perfectly right in passing the order of acquittal and I see no justification to interfere with the same. The appeal, being devoid of merits, is dismissed.

.....